

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Affidavit of Mailing

77-1065

77-1066

To be argued by
STEVEN G. NELSON

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket Nos. 77-1065, 77-1066

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN TARKO and ROBERT E. MYLAN,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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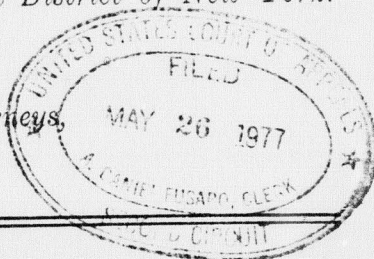


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JOHN TARKO and ROBERT E. MYLAN,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants, John Tarko and Robert E. Mylan, appeal from judgments of conviction dated January 28, 1977 and February 7, 1977, respectively, rendered after each pled guilty in the United States District Court for the Eastern District of New York (Mishler, Ch. J.), to one count of possessing stolen United States Treasury checks, in violation of Title 18, United States Code, Sections 641 and 2. Appellant Tarko was sentenced to incarceration pursuant to the Youth Correction Act (Title 18, United States Code, § 5010(b)) but is presently free on bail pending appeal. Appellant Mylan was sentenced to seven years imprisonment and he, too, is free on bail pending appeal.

On this appeal, each appellant alleges that the search of Mylan's automobile and the seizure of \$280,000 in

stolen United States Treasury checks from that vehicle was illegal because the warrant upon which the search was predicated lacked probable cause. It is also contended that the fruits of that search should have been suppressed.¹

Statement of Facts

On June 1, 1976, a search warrant was issued by United States Magistrate Vincent A. Catoggio authorizing the search of an automobile owned by appellant Mylan (Tarko Appendix, Exhibit E). The warrant was based upon an affidavit (Mylan Appendix, Exhibit C) sworn to on the same day by Special Agent Eugene L. Crouch, Federal Bureau of Investigation. The Crouch Affidavit, based in part upon information provided by an unnamed informant, averred that Mylan would be driving toward LaGuardia Airport that day with more than \$280,000 in stolen Government checks in his possession.

Pursuant to that search warrant, agents of the Federal Bureau of Investigation stopped appellant Mylan's vehicle in the vicinity of LaGuardia Airport, searched the vehicle, and seized approximately \$280,000 worth of stolen United States Treasury Checks. Appellant Mylan was arrested contemporaneously. Thereafter, on July 1, 1976, appellant Tarko was arrested.

On July 22, 1976, the Grand Jury returned an indictment (Tarko Appendix, Exhibit C) charging each appellant with thirteen (13) counts of receipt, concealment and retention of stolen United States Treasury Checks, 18 U.S.C. §§ 641 and 2. Each appellant was also

¹ In pleading guilty, by agreement with the Government and the consent of the Court, both appellants reserved the right to appeal the denial of the suppression motions. See, *United States v. Faruolo*, 506 F.2d 490, 491 n. 2 (2d Cir. 1974).

charged with one count of conspiring to commit the aforesaid offenses, 18 U.S.C. § 371.

By notices of motion dated September 1 and 2, 1976, respectively (Tarko Appendix, Exhibits F and G), appellants Tarko and Mylan moved to suppress the evidence seized pursuant to the aforementioned search warrant, contending that the Crouch Affidavit was insufficient to establish probable cause to search Mylan's vehicle. No hearing was held on these motions to suppress.

By a Memorandum of Decision and Order, dated October 15, 1976 (Tarko Appendix, Exhibit D), the District Court (Mishler, Ch. J.) denied appellants' motions, finding that the Crouch Affidavit provided sufficient information for the Magistrate to have concluded that the informant mentioned in the affidavit was credible and that the information provided by him was reliable (Tarko Appendix at D-18-19). In so concluding, Judge Mishler noted the substantial independent corroboration of the information provided by the informant. *Id.*

Subsequently, each appellant entered a plea of guilty to one count of receipt, concealment and retention of stolen Treasury checks, preserving for appeal the issues previously raised in the suppression motion.

Inasmuch as the only issue on the appeal relates to the sufficiency of the Crouch Affidavit, the text of that affidavit is set forth in full:

EUGENE L. CROUCH, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

Your deponent has reason to believe that there is presently being possessed, concealed and retained

in the vehicle known and described as a 1975 Lincoln, bearing New Jersey license plate number 777CYS, approximately Two Hundred Eighty Thousand Dollars (\$280,000.00) in stolen negotiable United States Government checks in violation of Title 18, United States Code, Section 641.

The source of your deponent's information and the grounds for his belief are:

(1) A confidential informant who has furnished reliable information to the Federal Bureau of Investigation in the past which information has led directly to the recovery of a total in excess of Seventy Thousand Dollars (\$70,000.00) in stolen negotiable securities, advised that on April 29, 1976, Robert Mylan, a resident of South New Jersey, who drives a 1974 or 1975 yellowish green Lincoln bearing New Jersey license number 777-CYS, had in his possession approximately Five Hundred Thousand Dollars (\$500,000.00) worth of stolen United States Government checks, a portion of which he was attempting to sell to a prospective buyer in New York City.

(2) During the week of May 3-7, 1976, the confidential informant advised that Robert Mylan made a trip to New York City for the express purpose of exhibiting some samples of the stolen United States Government checks described above to said prospective buyer. The informant personally observed one of the sample checks and noted that it bore serial number 2834643 in the amount of One Hundred One Dollars (\$101.00) and some odd cents. According to the informant Robert Mylan is asking 20 cents on a dollar for these stolen checks.

(3) Also during the period May 3-10, 1976, Robert Mylan, according to the informant, driving

the above-described Lincoln, bearing New Jersey License number 777CYS, travelled to New York City where he met the aforementioned prospective buyer and turned over to this individual in excess of Eighty Thousand Dollars (\$80,000.00) in stolen negotiable United States Government checks for the sum of approximately Fifteen Thousand Dollars (\$15,000.00). The informant, who was in a position to personally observe some of the above checks, advised that one of these checks bore serial number 28348722 in the amount of Two Hundred Thirteen Dollars (\$213.00) and some odd cents.

(4) Records of the Division of Motor Vehicles State of New Jersey were checked by an Agent of the Federal Bureau of Investigation on April 29, 1976, which check revealed that New Jersey License 777CYS is registered to Robert E. Mylan, residing at 95 Tunes Brook Drive, Brick Town, New Jersey, on a 1975 green, 4 door Lincoln.

(5) By communication dated May 7, 1976, the Washington Field Office of the Federal Bureau of Investigation advised that inquiry at United States Secret Service, Washington D.C. (USSS) revealed United States Government checks bearing numbers 28348643 and 28348722 are valid and not in the name of Robert Mylan. USSS further advised that their inquiry at the United States Treasury Fiscal Services Division of Disbursements, Birmingham, Alabama, revealed that the above described checks were issued and placed in the mail on April 29, 1976 for delivery to the respective payees. In addition, USSS advised that these checks were mailed care of U.S. Treasury Distribution, Rochester, New York and stolen in bulk either from a central post office facility or at an airport in the Rochester, New York area. If stolen in bulk or in mail pouch, USSS stated that the

number of checks would be in sufficient quantity to be valued at one half million dollars.

(6) On June 1, 1976, the aforesaid informant advised that Robert Mylan would proceed to the Eastern Airlines Shuttle Parking Lot at LaGuardia Airport, Queens, New York with approximately Two Hundred Eighty Thousand Dollars (\$280,000.00) worth of stolen checks, dated on or about May 30 or May 31, 1976, to be sold to the prospective buyer on June 1, 1976 at the aforesaid location. The informant further advised that Robert Mylan would be driving to that location in the previously described 1975 Lincoln bearing New Jersey license plate number 777CYS and that the aforementioned stolen checks would be secreted in that vehicle.

(7) Verification by Agents of the Federal Bureau of Investigation that Robert Mylar was observed on June 1, 1976 driving the above described Lincoln north on the Garden State Parkway toward New York City.

(8) Information provided by the Kansas City Office of the Federal Bureau of Investigation that a shipment of Government checks dated May 31, 1976 were mailed to Rochester, New York on May 2, 1976.

WHEREFORE, your deponent respectfully requests that a search warrant be issued authorizing your deponent and other agents of the Federal Bureau of Investigation to enter the vehicle known and described as a 1975 Lincoln bearing New Jersey License plate number 777CYS and there to search for and to seize the aforementioned quantity of stolen negotiable United States Government checks relating to a violation of Title 18, United States

Code, Section 641, which are presently being possessed, concealed and retained in violation of law. (Mylan Appendix, Exhibit C)

ARGUMENT

The Search Warrant Was Issued Upon An Affidavit Establishing Probable Cause.

A. Introduction.

Appellants contend that the information set forth in the Crouch Affidavit was insufficient to provide the Magistrate with probable cause to believe that the evidence sought in the search warrant would be in the Mylan vehicle at the time of the requested search.² To confront

² Appellant Tarko contends that he has automatic standing to contest the search of Mylan's vehicle. Initially, we renew our argument, previously rejected by this Court in *United States v. Galante*, — F.2d —, Slip op. 959 (2d Cir. December 14, 1976), that the automatic standing rule should be abolished. Additionally, we submit that, as to Tarko, possession *at the time of the search* (either actual or constructive) was not an essential element of the crime and, therefore, he has no automatic standing. See *Brown v. United States*, 411 U.S. 223 (1973); *United States v. Galante*, *supra*. Tarko clearly was not in actual possession at the time of the search; nor was constructive possession at that time an essential element of the crime charged. Tarko pled guilty to receipt, concealment and retention of a stolen U.S. Treasury check. The acts of receipt, concealment and retention could have taken place at any time on June 1 or, perhaps, the day before. Accordingly, the automatic standing rule should not be applied.

In the absence of automatic standing, it is clear that Tarko does not have standing to contest the search of Mylan's vehicle. He did not have a possessory interest in the car, nor was he present at the time of the search. See *United States v. Galante*, *supra*.

this position, it is necessary to examine the Crouch Affidavit in detail. That affidavit provided the following critical facts: (1) that the confidential informant had previously furnished reliable information to the FBI which had led directly to the recovery of more than \$70,000 in stolen securities; (2) that Mylan had had more than \$500,000 in stolen United States Government checks in his possession on April 29, 1976 and more than \$80,000 worth of similarly stolen checks at another time during the following two weeks; (3) that Mylan drove a late model green Lincoln bearing New Jersey license number 777-CYS; (4) that on at least two occasions the informant had personally observed amounts, dates and serial numbers on the aforementioned checks; (5) that the informant's description of the car that Mylan had been driving was corroborated by independent investigation to be a car registered in Mylan's name; (6) that the serial numbers of the checks observed by the informant were corroborated by independent investigation to have been the serial numbers of checks dated as the informant described; (7) that the checks described were determined to have totalled more than \$500,000 and to have been stolen in bulk in transit to Rochester, New York; (8) that the informant advised that, on June 1, 1976, Mylan would proceed to LaGuardia Airport with approximately \$280,000 worth of stolen checks dated May 30, or May 31, 1976 and that he would be driving the previously-identified vehicle; (9) that independent investigation provided corroboration that checks dated May 31, 1976 were mailed to Rochester, New York; and (10) that Mylan was observed on June 1, 1976 driving the previously-identified vehicle north on the Garden State Parkway toward New York City.

The issue of whether these critical facts together with the other information contained in the Crouch Affidavit provided probable cause for the search in question is governed by principles enunciated in *Spinelli v. United States*,

393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964). Those decisions formulated a two-pronged test for determining whether there was sufficient justification to support the issuance of a search warrant. If an affidavit in support of an application for a search warrant is based upon information provided by an informant, the affidavit must, first, set forth some of the "underlying circumstances" forming the basis of the informant's conclusion that there is evidence of illegal activity on the premises, and, second, it must set forth facts which give some assurance that the informant is credible or his information reliable. *Spinelli v. United States*, *supra*, at 413 (1969).

The purpose of the *Aguilar-Spinelli* formulation is, of course, to assure that the reviewing magistrate will act independently and cautiously rather than merely as a rubber stamp. Search warrants should issue only when the facts alleged are sufficient to convince a reasonably prudent and neutral individual that evidence of a crime is to be found in the premises to be searched and that the informant's information has been obtained in a reasonably reliable manner, rather than by way of gossip, rumor, speculation or mere suspicion. *Spinelli v. United States*, 393 U.S. 410, 416 (1969); *United States v. Karanthanos*, 531 F.2d 26, 29-30 (2d Cir.), *cert. denied*, 425 U.S. 335 (1976).

In the instant case, both the Magistrate and the District Court found that the Crouch Affidavit provided probable cause to believe that the stolen checks were in Mylan's vehicle at the time of the search. In reviewing the Magistrate's decision, it is well-settled that that decision is accorded deference and will be overturned only if palpably improper. See *United States v. Londono*, — F.2d —, Slip op. 2961, 2970 (2d Cir. April 18, 1977); *United States v. Canestri*, 518 F.2d 269, 273

(2d Cir. 1975); *United States v. Ramirez*, 279 F.2d 712, 716 (2d Cir.), *cert. denied*, 364 U.S. 850 (1960). Moreover, in scrutinizing the Magistrate's decision, the Court "should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner." *United States v. Ventresca*, 380 U.S. 102, 109 (1965); see *United States v. Soyka*, 394 F.2d 443, 453 (2d Cir. 1968) (en banc), *cert. denied*, 393 U.S. 1095 (1969); *United States ex rel. Rogers v. Warden of Attica State Prison*, 381 F.2d 209, 218 (2d Cir. 1967). Likewise, in a difficult or marginal case, a search under a warrant may be sustainable where without one the search would fall. See *United States v. Ventresca*, 380 U.S. 102, 106, 109 (1965); *Jones v. United States*, 362 U.S. 257, 270 (1960).

B. Reliability of the Informant.

It is within this basic framework that the instant affidavit and search warrant must be viewed. Addressing the second prong of the *Aguilar-Spinelli* formulation first, it is abundantly clear, as found by the District Court, that the Crouch Affidavit provided sufficient information for the Magistrate to have concluded that the unnamed informant was credible and his information reliable. Indeed, the brief of each appellant virtually concedes credibility. See Tarko Brief at 19; Mylan Brief at 6-7.

The first paragraph of the Crouch Affidavit states that the informant had furnished the FBI with accurate and reliable information in the past, and that that information had led directly to the recovery of more than \$70,000 in stolen securities. This statement, in and of itself, is more than sufficient to meet the credibility requirement enunciated in *Aguilar*, *supra* and its progeny. See *United States v. Pond*, 523 F.2d 210, 213 (2d Cir. 1975); *United States v. Rollins*, 522 F.2d 160, 164-65

(2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Sultan*, 463 F.2d 1066, 1068-69 (2d Cir. 1972). Moreover, it is well-settled that the credibility of an informant and the reliability of his information can be demonstrated by matching information gathered by governmental authorities with that provided by the informant. See *Spinelli v. United States*, 393 U.S. 410, 417-18 (1969) (discussing *Draper v. United States*, 358 U.S. 307 (1959)); *United States v. Canestri*, 518 F.2d 269, 272 (2d Cir. 1975).

Here the information provided by the informant concerning the license plate number and description of Mylan's car, the serial numbers, amounts and dates of the stolen checks, the fact that the checks had been stolen in bulk and the direction in which Mylan was driving on June 1st (in the car described) was corroborated in its entirety by independent investigation conducted by various government authorities. Accordingly, it is readily apparent that the second prong of the *Aguilar-Spinelli* test, that of credibility of the informant and reliability of his information, was met in the instant case.

Appellant Tarko raises various minor inaccuracies or discrepancies in the Crouch Affidavit which, it is contended, lead to the conclusion that the informant was not credible. Tarko mentions that the affidavit did not provide specificity as to the prior information which the informant had given, which information had led directly to the recovery of \$70,000 in stolen securities (Tarko Brief at 13). The authorities previously cited make it perfectly clear that no such specificity is required and that the mere recitation of the fact that the informant had proved reliable in the past is sufficient. See e.g., *United States v. Pond*, 523 F.2d 210, 213 (2d Cir. 1975); *United States v. Sultan*, 463 F.2d 1066, 1068-69 (2d Cir. 1972).

Appellant Tarko claims a further possible inconsistency in the fact that the checks mailed on April 29 had been reported stolen by May 7, while the checks dated May 31, 1976 had, according to paragraph "8" of the Crouch Affidavit, been mailed on May 2, 1976 and, yet, had not been reported stolen by June 1, 1976 (Tarko Brief at 14). In the first instance, it is entirely possible that the checks dated May 31 were mailed on May 2 and were not stolen until a day or two before the time the affidavit was drawn, thereby making detection difficult by June 1. Unlike the checks mailed on April 29 to recipients, these later checks were sent not to recipients, but rather to the Rochester Post Office for later distribution to recipients. These later checks, like the April 29 checks, could not have been determined to have been stolen until one week after they were to have been mailed to the payees from the distribution center. Accordingly, the fact that they were stolen might not have been uncovered (going by the example of the April 29 checks) until June 6 or 7. Therefore, it is evident that there is no obvious or inherent inconsistency in this portion of the Crouch Affidavit. Moreover, even if there were an inconsistency, that inconsistency occurred in paragraph "8" which merely recited the date identified by independent FBI investigation as having been the date of mailing. Surely, this would in no way effect the informant's credibility. At most, it might indicate either a typographical error regarding the May 2 date or a minor inconsistency in the facts uncovered by the FBI. In any event, it is well-settled that such a minor inaccuracy or discrepancy will not invalidate an affidavit which otherwise demonstrates probable cause. See *Mapp v. Warden*, 531 F.2d 1167, 1172-73 (2d Cir. 1976); *United States v. Pond*, 523 F.2d 210, 213-14 (2d Cir. 1975).

Another claimed minor inaccuracy, raised by Tarko, is the fact that the informant said that Mylan possessed checks on May 29 which were later determined to have

been mailed on May 29. Tarko asserts that, inasmuch as the checks were mailed from Alabama, it is unlikely that Mylan could have possessed them on the same day in New Jersey (Tarko Brief at 13 n. 2). Initially we note that the Crouch Affidavit does not state, as Tarko contends, that the checks were mailed from Birmingham, Alabama. It merely states that inquiry regarding the checks were made there. Accordingly, it is possible that Mylan possessed checks on April 29 which had been mailed on that date. This would depend in large measure on the place of mailing. More importantly, the exact date of the prior possession was not relevant to a determination of probable cause. At most, it too was a minor inaccuracy which, as previously demonstrated, would not invalidate the warrant. It is clear, despite appellant's frivolous contentions to the contrary, that the Crouch Affidavit more than amply demonstrated that the informant here was credible and his information reliable. Not only had he proved reliable in the past, but independent police investigation, corroborating key aspects of the informant's information, demonstrated that there was a substantial basis for crediting the hearsay. See *United States v. Harris*, 403 U.S. 573, 581 (1971); *Mapp v. Warden*, 531 F.2d 1167, 1171 (2d Cir. 1976); *United States v. Rollins*, 522 F.2d 160, 164-65 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976). Accordingly, it is evident that the informant here was credible and that appellants' contentions regarding the reliability of his information are without merit.

C. Underlying Circumstances to Support Informant's Information.

As to the other prong of the *Aguilar-Spinelli* formulation, it is clear that the Crouch Affidavit amply set forth the underlying circumstances necessary to enable the Magistrate to judge the validity of the informant's conclusion that \$280,000 worth of stolen checks would be

found in Mylan's vehicle at the time of the search and that Mylan was engaged in the illegal sale of stolen securities.

Much of the information provided by the informant here was based on personal observation. He had personally seen and described the vehicle that Mylan had been and would be driving. He had also personally observed the dates, amounts and serial numbers of individual checks contained in two different batches of stolen Government checks. Finally, paragraph "3" states that the informant had been in position to personally observe one of the checks exchanged in the \$15,000 sale. Although paragraph 3 is somewhat ambiguous, it strongly suggests that the informant must have seen the exchange itself. Only if he had witnessed the sale itself could he have provided the information that one of the checks actually exchanged was the check he had seen. The progeny of *Aguilar, supra*, and *Spinelli, supra*, have given repeated recognition to personal observation as a reliable basis for an informant's report. *United States v. Ventresca*, 380 U.S. 102, 110-11 (1965); *Cameron v. Fastoff*, — F.2d —, Slip op. 3369, 3377-78 (2d Cir. April 22, 1976); *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Viggiano*, 433 F.2d 716, 719 (2d Cir. 1970), *cert. denied*, 401 U.S. 938 (1971). Moreover, the personal observations may be, as here, observations of prior conduct committed in the course of a continuing conspiracy. See, e.g., *Ventresca, supra*.

Appellants argue that the informant's observation of the prior batches of stolen checks and his information relating to the prior illegal sale of stolen checks by Mylan amounted merely to allegations of past criminal activity and, therefore, were not relevant to the determination of probable cause (Mylan Brief at 8). Initially, it is sig-

nificant to note that the information regarding Mylan's previous possession and transactions was not merely proof of past criminal activity. It is clear from the affidavit that appellants had been dealing in stolen Government checks. Obviously, therefore, the informant's May information related not merely to past criminal conduct but also to present illegal conduct in which the May transaction played a significant role.

United States v. Harris, 403 U.S. 573 (1971), is cited by Mylan for the proposition that evidence of past criminal activity cannot substitute for a demonstration of the manner in which an informant obtained his information. In the instant case, however, we have evidence of ongoing criminal activity. Moreover, there is a detailed showing here of the manner in which the informant and federal authorities obtained the information contained in the Crouch Affidavit. Additionally, it has often been recognized that, while past criminal activity will not, in and of itself, establish probable cause, it is a factor which may be considered by the magistrate in establishing reliability. See *Cameron v. Fastoff*, — F.2d —, Slip op. 3369, 3378 (2d Cir. April 22, 1976); *United States v. Karanthanos*, 531 F.2d 26, 31-32 (2d Cir.), cert. denied, 425 U.S. 335 (1976); *United States v. Canestri*, 518 F.2d 269, 272-73 (2d Cir. 1975).

Another factor contributing significantly to the finding of probable cause in the instant case was the overwhelming corroboration of specific information provided by the informant. Mylan asserts that the only corroboration of the informant's tip was that Mylan was observed traveling north on the Garden State Parkway toward New York on June 1, 1976 (Mylan Brief at 6). Mylan's brief conveniently overlooks the corroboration, by independent investigation, of the serial numbers of the checks described and of the fact that they had been determined to

have been stolen. Mylan's brief also ignores the corroboration of both the description and the license number of the car Mylan would be driving, as disclosed by the informant. Finally, of course, Mylan fails to mention in his brief the critical corroboration of the May 31, 1976 date on the checks which the informant stated Mylan would be carrying on June 1, 1976.

The detailed description here of how the informant's information was gathered, together with the overwhelming corroboration of critical facts disclosed by the informant, yield the conclusion that the Crouch Affidavit provided probable cause for the issuance of the warrant in question. Such corroboration has been repeatedly recognized as a sufficient basis for a finding of probable cause. See, e.g., *Draper v. United States*, 358 U.S. 307, 313 (1959); *United States v. Edmonds*, 535 F.2d 714, 720 (2d Cir. 1976); *Mapp v. Warden*, 531 F.2d 1167, 1171 (2d Cir. 1976); *United States v. Canestri*, 518 F.2d 269, 272 (2d Cir. 1975). Moreover, in response to Tarko's assertion that the corroboration here was not corroboration of criminal activity (Tarko Brief at 15), it is well-settled that an informant's story may be confirmed as reliable by other facts which become known to governmental authorities, even if they corroborate only "innocent aspects" of the story. See *United States v. Draper*, 358 U.S. 307, 313 (1959); *United States v. Rueda*, — F.2d —, Slip op. 1765, 1773 (2d Cir. Feb. 10, 1977); *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972).

Although Mylan cites *United States v. Edmonds*, 535 F.2d 714 (2d Cir. 1976) as supportive of his position that there was insufficient corroboration and no probable cause here, a careful analysis of that opinion yields quite the opposite conclusion. In *Edmonds*, *supra*, an informant

reported the following information to the authorities: that Edmonds had to be in Norfolk on May 1; that he would travel by bus the evening before; that he might have a female companion; that he would be carrying about two ounces of high quality heroin; and that the informant had seen the heroin in Edmonds' possession. The *Edmonds* Court found that the above provided, in and of itself, sufficient detail to justify a finding of probable cause.

The facts here are virtually identical. The informant said that Mylan would be travelling north toward New York on June 1, that he would be driving a yellowish green Lincoln bearing license number 777CYS and that he would be carrying \$280,000 worth of stolen Government checks dated May 30 or May 31. Unlike *Edmonds*, *supra*, however, we have here the additional personal observation and identification of checks previously stolen, together with a recitation of prior criminal acts committed during an ongoing course of criminal conduct. All of the above facts were corroborated by independent investigation and, therefore, the affidavit here was, in many respects, stronger than that held to provide probable cause in *Edmonds*, *supra*.

Appellants point to the fact that the *Edmonds* informant had personally seen the contraband in Edmonds' possession. However, in the instant case, although the informant did not actually state that he had seen the stolen checks in Mylan's possession, paragraph "3" strongly suggests that he did. Indeed, this is the only reasonable inference which can be drawn from paragraph "3" and the balance of the Crouch Affidavit. Thus, viewing the entire affidavit and the totality of circumstances presented therein, Chief Judge Mishler found that,

"A person of reasonable caution could infer that the Federal Bureau of Investigation's informant

was either assisting Mylan in the sale of the stolen checks or was sufficiently friendly with Mylan to be in a position to observe the preparations for the sales or the actual sales themselves. Indeed, the nature of the other information provided by the informer—the description of Mylan's car, the direction he was driving on June 1st, the amount of money secreted in the car—support just such an inference." (Tarko Appendix at D-19).

Tarko asserts that this was an unreasonable inference to have drawn, because the description and direction of the car were merely innocent aspects not sufficiently unique to support only the inference drawn by the District Court. Tarko chooses to overlook the personal observation of the check dates, amounts and serial numbers and the fact that the informant identified the amount of checks to be carried by Mylan on June 1, i.e., \$280,000.³ As the District Court found, these facts lead ineluctably to the conclusion that the informant was involved with Mylan in some first-hand manner. That such an inference may be properly drawn if, as here, there is a sufficient factual underpinning for it cannot be seriously disputed. See *Spinelli v. United States*, 393 U.S. 410, 417 (1969); *United States v. Ventresca*, 380 U.S. 102, 110-111 (1965); *United States v. Pond*, 523 F.2d 210, 213 (2d Cir. 1975); *United States v. Soyka*, 394 F.2d 443, 453 (2d Cir. 1968) (en banc), *cert. denied*, 393 U.S. 1095 (1969). Accordingly, it is clear, that, although the Crouch Affidavit provided sufficient factual specificity which, in and of itself, supported a finding of probable

³ Tarko makes the curious observation that the amount of checks verified at the time of seizure is inadmissible. Of course, this misses the point. The informant had specified the amount of checks involved *before* the seizure.

cause, the additional independent corroboration, together with inferences properly drawn from the facts presented, leads to no other conclusion but one of probable cause.

Appellants' further claim that the affidavit is deficient because it "is devoid of any showing whatsoever of how or why the informant believed that the stolen checks were stored in appellant Mylan's car" (Mylan Brief at 7). We contend that this argument is simply without merit. *Spinelli* and its progeny have recognized that where, as here, the informant described the accused's criminal activity in sufficient detail such that the Magistrate may know that he is relying on something more than a casual rumor circulating in the underworld or an assertion based merely on an individual's reputation, it is not necessary that the affidavit detail the manner in which the information was gathered. *Spinelli v. United States*, 393 U.S. 410, 416 (1968); See *United States v. Karanthanos*, 531 F.2d 26, 31 (2d Cir.), cert. denied, 425 U.S. 335 (1976); *United States v. Edmonds*, 535 F.2d 714 (2d Cir. 1976) (where there was no indication of how the informant reached the conclusion that Edmonds would be carrying heroin on May 1 and, yet, the Court found a sufficient factual underpinning from which to find probable cause). In any event, the Crouch Affidavit provided a sufficient factual basis from which both the informant and the Magistrate could have concluded that Mylan would have \$280,000 worth of stolen checks in his possession while traveling to New York on June 1.

Tarko's claim that, "[f]or aught that appears, the informant was basing his allegations upon rumor and surmise" (Tarko Brief at 18) is patently frivolous. The Crouch Affidavit set forth detailed descriptions of past criminal conduct, personal observation by the informant, corroboration of the dates and serial numbers of stolen checks and corroboration of other critical "innocent as-

pects" of the informant's story. Therefore, the Crouch affidavit is not subject to the criticism that it was based on mere casual rumors or idle speculation.

The decision in *Draper v. United States*, 358 U.S. 307 (1959) is on all fours with the facts here. In that case, an informant named Hereford told a federal agent named Marsh that Draper had recently taken up abode at a stated address and was peddling narcotics. Four days later, on September 7, 1956, Hereford told Marsh that Draper had gone to Chicago by train the day before, that he was going to bring back three ounces of heroin and that he would return to Denver by train on September 8 or 9. Hereford also gave Marsh a detailed physical description of the clothing Draper was wearing and said that he would be carrying a tan zipper bag and that he habitually walked fast.

The facts here are virtually identical to those in *Draper, supra*, except that they are perhaps more probative of probable cause. The informant said that Mylan lived in southern New Jersey and that he had previously dealt in stolen checks, some of which were identified by date, amount and serial number. The informant stated that, on June 1, 1976, Mylan would be returning to New York by car and that he would be carrying \$280,000 worth of stolen checks. Although in *Draper, supra*, a detailed physical description of the individual was provided to facilitate identification at the time of disembarkation, here the detailed description was of the vehicle. In each case the informant gave very detailed and specific information so that identification would be easy.

The Supreme Court in *Draper, supra*, found that the above information, together with independent corroboration of the innocent aspects described, provided probable

cause to believe that Draper was carrying the identified drugs when apprehended. It should be noted that, with respect to the claim that the informant did not state how he knew Mvian would be carrying stolen checks on June 1, the *Draper* informant also failed to provide federal authorities with any indication of the basis for his conclusion that Draper would be carrying heroin at the time of the search. Nevertheless, the Supreme Court found probable cause based on the detailed facts presented elsewhere in that affidavit. See also the discussion of *Draper, supra*, in *Spinelli v. United States*, 393 U.S. 410, 416-417 (1969). It is submitted that, inasmuch as the facts presented here are entirely analogous to those presented in *Draper, supra*, the same result should obtain.

Appellants point to various other decisions in support of their argument that the warrant here was insufficient. Each of these authorities is inapposite or unpersuasive on the facts presented. Most particularly, appellants refer to *United States v. Karanthanos*, 531 F.2d 26 (2d Cir.), *cert. denied*, 425 U.S. 335 (1976), where this Court found that an affidavit in support of a search warrant did not evidence probable cause. In that case, one Athanasiou, an admitted illegal alien, surrendered to the Immigration and Naturalization Service and stated that numerous other illegal aliens resided with him at the restaurant to be searched. He indicated that they lived in cramped quarters and that at least six individuals were known to him to be illegal aliens. Finally, the INS agent mentioned in his affidavit that eleven illegal aliens had been apprehended at that restaurant within the previous five years. This Court affirmed a decision finding the warrant insufficient.

Appellants contend that the indicia of reliability in *Karanthanos, supra*, were greater than those found in the instant case. (See Tarko Brief at 17). This position

does not withstand scrutiny. Initially, it is significant to note that the information given by Athanasiou was rather sparse and that there was virtually no independent corroboration of any of the facts provided by him. In the instant case, there was independent corroboration of many innocent aspects of the informant's story and of the dates, serial numbers and amounts of the previously-identified checks. Moreover, there was corroboration that these checks, which had been personally observed by the informant, had, in fact, been stolen. Therefore, *Karanthanos, supra*, is, for this reason alone, distinguishable.

Appellants point to the fact that the *Karanthanos* Court refused to infer that the informant knew that these other individuals were illegal aliens as a result of their own comments to him. They contend that Chief Judge Mishler's inference here was equally unsupportable. However, appellants conveniently overlook the fact that the Court in *Karanthanos, supra*, specifically mentioned that there was absolutely no specification of criminal activity or evidence of how Athanasiou reached his conclusion and that, in such circumstances, it was improper to draw the suggested inference (particularly when the inference required that individuals had to have made declarations against their own penal interest). Here, however, the Crouch Affidavit satisfied either of the alternative requirements enunciated in *Karanthanos, supra*, i.e. specification of how the informant reached his conclusion and a detailed description of criminal activity.⁴

⁴ Appellants point to the fact that past criminal conduct alone was held in *Karanthanos, supra*, not to support a finding of probable cause. In the instant case, however, the conduct alleged was part of ongoing criminal activity and, of course, unlike *Karanthanos, supra*, there was overwhelming independent evidence to support a finding of probable cause.

Based on the foregoing, we submit that both prongs of the *Aguilar-Spinelli* formulation have been satisfied and, therefore, that the Crouch Affidavit provided facts from which the Magistrate could reasonably have concluded that \$280,000 worth of stolen Government checks would be found in Mylan's vehicle on June 1, 1976. Accordingly, the District Court properly refused to suppress the evidence seized from the Mylan vehicle.⁵

CONCLUSION

The order of the District Court should be affirmed.

Dated: Brooklyn, New York

~~April 14, 1977~~

May 23,

Respectfully submitted,

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⁵ The Government recognizes that this Court has previously rejected the argument that, even if a warrant is later determined not to have been issued upon probable cause, the Exclusionary Rule should not be applied because the purpose behind the rule i.e., deterrence of improper police conduct, is not furthered thereby. See *United States v. Karathanos*, 531 F.2d 26 (2d Cir.), cert. denied, 429 U.S. 335 (1976). Nevertheless, we renew that argument here.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 26 day of May 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

David W. McCarthy

Legal Aid Society

10 Village Sq.

509 U.S. Courthouse

Glen Cove, NY 11542

Foley Sq., New York, N.Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this

26th day of May 19 77

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298

Qualified in Queens County
Term Expires March 30, 1979